No. 3037

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FIREMAN'S FUND INSURANCE COMPANY (a corporation),
Plaintiff in Error,

vs.

TROJAN POWDER COMPANY (a corporation),
Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

EDWARD J. MCCUTCHEN,
MCCUTCHEN, OLNEY & WILLARD,
Attorneys for Plaintiff in Error.

BERNAU-WALSH PRINTING CO.

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It is not our intention to restate at length the principles upon which this cause should be decided and the judgment of the District Court reversed. Nevertheless, the argument advanced by defendant in error is so falacious in most of its essential particulars, and so revolutionary in its attempt to overturn settled principles of English marine insurance law, that we deem it necessary to call the court's attention thereto, lest it should be misled by the adroitness with which it is made.

As we read defendant in error's brief, it contends in effect that particular charges are to be recovered as particular average; that forwarding charges are by the custom of England a loss under the policy, and

that the doctrine of proximate cause should be overturned. To this we cannot subscribe.

Forwarding charges are recoverable as particular charges.

There is nothing in Sections 869 and 214 of *Arnould on Marine Insurance* which detracts from our contention that forwarding expenses and particular charges are only recoverable as such. It will be noted from the remarks of the author (Arnould) in Sec. 214 that he expressly refers to the *Kidston* case as his authority for that portion of the text quoted on page 12 of defendant in error's brief. That case holds, in consonance with Sec. 64 of the Insurance Act, that excess freight is collectible as a particular charge and not as particular average, because incurred to save what would otherwise have been a loss on the underwriters. The author expressly states in Sec. 214 that the practice is to pay such excess as particular charges. This is said not to be inconsistent with the provisions of the Marine Insurance Act, but Sec. 64 expressly states that particular charges are those expenses incurred by or on behalf of the assured *for the safety or preservation of the subject matter insured.* That the author has no thought of breaking away from this principle is shown by the unquoted portion of Sec. 214.

Defendant in error makes strenuous effort to avoid the condition of the expenses being incurred *for the safety of the subject matter insured,* for the very apparent reason that the forwarding expenses here involved were not incurred for that purpose, but to avoid a possible loss by delay. To accomplish that result,

however, this court would be required to disregard Sec. 64 (2) of the Act. To suggest such necessity demonstrates the fallacy of the argument.

Nor does the policy in suit contain a direct insurance of the forwarding charges, as did the policy in the Popham case, and the attempt of defendant in error to construe the marginal clause to that effect (brief pp. 18-19) absolutely disregards the words "for which they would otherwise be liable". The effect of the clause is simply to provide that the underwriters are to be liable for any special charges for forwarding for which they would otherwise be liable *but* for the F. P. A. warranty. That is far from providing an absolute liability for forwarding charges as a direct insurance. But to ascertain for what forwarding charges the underwriters would be liable, the court must look to the law and not to the policy for the policy makes no other provision in respect thereto. The law, however, makes forwarding charges recoverable as particular charges, and the latter only include expenses incurred for the safety or preservation of the subject matter insured. Nor is there anything in the so-called history of the F. P. A. clause which detracts from those principles.

Notwithstanding all that defendant in error says, we press upon the court that the principles enunciated in *Great Indian Peninsula Ry. Co. v. Saunders* and *Booth v. Gair* are decisively in our favor, and that they do not hold that forwarding charges are recoverable as particular average. All that is said in the former case is "that, *if* he could recover, it would be on the

ground that the disbursement for extra freight was * * * a particular average," but that is far from holding that they are recoverable as particular average. The presence of the word *if* gives an entirely different construction to the court's opinion. And so in *Booth v. Gair,* the court does not go as far as the court in the former case, and whatever it has to say about the custom of underwriters is to the effect that charges on cargo were paid as *particular charges.* Neither case supports the contention that forwarding charges are a direct liability or particular average, but classifies them as particular charges. And recovery was not allowed in those cases because the forwarding expenses did not save the underwriters from any loss but for which they would otherwise have been liable. The fact that the policies contained the F. P. A. warranty does not distinguish the cases because the forwarding expenses to Panama in the instant case no more saved plaintiff in error from a loss for which it otherwise would have been liable than did the payment of freight in the cases cited preserve the subject matter from a total loss. The only loss saved by forwarding the powder so far as the record shows was a possible penalty under the contract of sale, the existence of which was unknown to plaintiff in error.

The cases of *Popham & Willett v. St. Petersburg Ins. Co.* involved, as we have pointed out, policies which directly insured forwarding charges as a straight liability. Liability was not made to depend, as in the present case, upon the general principles of the law, but was grounded upon an absolute insurance of for-

warding charges as such. They were lifted from the category of particular charges, and nothing that defendant in error has to say successfully controverts this distinguishing characteristic.

There is no custom of England fixing liability for the forwarding charges.

Defendant in error strains at an effort to prove liability under and alleged custom of England. Such a custom would be in direct conflict with the provisions of the Marine Insurance Act and the leading cases which we have cited. But even at that, it fails to show the custom.

If the court will closely examine the opinion in the *Kidston* case, it will note (Record p. 91) that several average adjusters were called to prove that * * * "expenses incurred in warehousing and forwarding are not particular average, but are termed *particular charges,*" the very rule for which we contend and strictly in consonance with the provisions of the Insurance Act. And this is recognized by Arnould in Sec. 214.

Certainly defendant in error falls far short of proving the alleged custom by such authorities.

Proximate cause.

Recognizing that the proximate causes of the loss in the case at bar were not insured against, defendant in error attempts to circumvent it by an extended argument intended to show, as it says on page 40 of its brief, that the question of proximate cause becomes immaterial.

But it cannot be immaterial unless the court shall set aside the settled principles of English Marine insurance law as stated by Lord Esher in *Pink v. Fleming,* 25 Q. B. D. 396, and the other cases cited in our opening brief pp. 30-39. And those principles are material for the *causa proxima* in the present case was not, as we have pointed out, a peril insured against. The cause of the loss for which recovery was sought was far removed from sea perils; it was due to a desire to avoid loss by delay, and this, as shown by *Taylor v. Dunbar,* 4 C. P. L. R. 206, etc., is not a loss under the policy.

As for the suggestion of commercial frustration, there were better grounds for applying that doctrine in *Gt. Indian Peninsula Ry. Co. v. Saunders* and *Booth v. Gair,* than in the case at bar, for there the vessels were total losses, whereas here the "Pleiades" was repaired, if the doctrine has any application, yet it was not even referred to by the court. But here the venture was not frustrated because the "Pleiades" was repaired and could have carried the cargo forward, but for defendant in error's desire to avoid a loss consequent upon the delay.

The case of *Jackson v. Union Marine Ins. Co.* is not in point for it is totally dissimilar in fact. There the charterer threw up the charter and the shipowner then collected under a chartered freight policy,—an entirely different proposition than the attempt of the cargo owner to recover forwarding charges incurred to avoid a loss by delay.

An insurer is not bound by the peculiar provisions of a bill of lading under which the insured chooses, without notice to the insurer, to ship its cargo.

The plaintiff in error is not bound by any and every provision of the bill of lading under which the cargo was shipped. It did not have any notice of its terms, and although those terms may be binding upon the carrier and shipper, it is obvious that the plaintiff in error did not contract with reference to its peculiar terms.

Schroeder v. S. L. T. V. G., 66 Cal. 294, 299.

There is not any showing in this record that plaintiff in error had any knowledge of the provision of the bill of lading that the freight was to be deemed earned vessel lost or not lost and in the absence of such showing we submit it is improper to hold that plaintiff in error is charged with notice of that provision.

We also desire to call the attention of the court to the recent case of *The Allanwilde,* 247 Fed. 236, where the rule was laid down that where a vessel returns to her port of departure on account of stress of weather, her owner cannot retain the prepaid freight and refuse to carry the cargo to destination, even though the bill of lading provides that freight is deemed earned vessel lost or not lost.

We respectfully submit that for the reasons herein and heretofore urged in our opening brief the judgment

of the District Court should be reversed with directions to enter judgment for defendant (plaintiff in error).

Dated, San Francisco,
May 11, 1918.

Respectfully submitted,

EDWARD J. McCUTCHEN,
McCUTCHEN, OLNEY & WILLARD,
Attorneys for Plaintiff in Error.